Docket #0451 Date Filed: 06/13/2025

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN RE:	)	CASE NO. 25-10356-PMB
	)	
AFH AIR PROS, LLC, *et. al.,*	)	JOINTLY ADMINISTERED
	)	
DEBTORS.	)	CHAPTER 11

UNITED STATES TRUSTEE'S OBJECTION TO DEBTORS' DISCLOSURE STATEMENT AND FORM OF BALLOTS

Mary Ida Townson, United States Trustee for Region 21, acting in furtherance of her responsibilities under 28 U.S.C. § 586, objects to the approval of the *Disclosure Statement for the Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt. No. 432). The disclosure statement does not provide creditors with adequate information to make an informed judgment about the Debtors' proposed plan, and, in conjunction with Debtors' plan, improperly imposes third-party releases on creditors without their affirmative consent. Further, the United States Trustee objects to the form of ballots contained in *Motion of the Debtors for Entry of an Order (A) Approving the Disclosure Statement on an Interim Basis, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Form of Ballot and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time, and Place for the Hearing on Final Approval of the Disclosure Statement and Confirmation of the Plan and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures and Deadlines* (Dkt. No. 433), as the proposed ballots do not adequately explicate the process and effect of the third-party release provisions.

25103562506130000000000005

FACTUAL AND PROCEDURAL BACKGROUND

1.

The above-captioned action is the lead case for 20 entities (hereinafter the "Debtors"), whose bankruptcy cases are being jointly administered for procedural purposes only.[1] The voluntary petitions initiating these bankruptcy cases were filed on March 16, 2025.

2.

On March 31, 2025, the United States Trustee appointed a Committee of Creditors Holding Unsecured Claims pursuant to 11 U.S.C. § 1102(a). (Dkt. No. 111).

3.

The Meetings of Creditors pursuant to 11 U.S.C. § 341(a) for Debtors was held and concluded on April 22, 2025.

4.

On May 30, 2025, Debtors filed the *Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and its Debtor Affiliates* (Dkt No. 431) (the "Plan") and the *Disclosure Statement for the Chapter 11 Plan of Liquidation of AFH Air Pros, LLC and Its Debtor Affiliates* (Dkt. No. 432) (the "Disclosure Statement").

[1] The last four digits of AFH Air Pros, LLC's tax identification number are 1228. Due to the large number of debtor entities in these chapter 11 cases, a complete list of the debtor entities and the last four digits of their federal tax identification numbers is not provided herein. A complete list of such information may be obtained o the website of the claims and noticing agent at https://www.veritaglobal.net/airpros. The mailing address for the debtor entities for purposes of these chapter 11 cases is: 150 S. Pine Island Road, Suite 200, Plantation, Florida 33324.

5.

On May 30, 2025, Debtors also filed the *Motion of the Debtors for Entry of an Order (A) Approving the Disclosure Statement on an Interim Basis, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Form of Ballot and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time, and Place for the Hearing on Final Approval of the Disclosure Statement and Confirmation of the Plan and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures and Deadlines* (Dkt. No. 433) (the "Solicitation Procedures Motion"). Within the Solicitation Procedures Motion, Debtors included, among other things, a proposed schedule for providing supplements to the Disclosure Statement and Plan, as well as a proposed form of ballot for each class of claims.

6.

The deadline to object to Debtors' Disclosure Statement and Solicitation Procedures Motion is June 13, 2025 at 4:00 P.M., prevailing Eastern Time. (Dkt. No. 434).

7.

Accordingly, this Objection to Debtors' Disclosure Statement and Solicitation Procedures Motion is timely.

GENERAL CITATION OF AUTHORITY

8.

Pursuant to Section 1125(b) of the Bankruptcy Code:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest, unless,

> at the time of or before such solicitation, there is transmitted to such holder the plan or summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.
> 11 U.S.C. § 1125(b).

9.

The phrase "adequate information" is defined by the Bankruptcy Code in this context to mean "information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records…that would enable such a hypothetical investor of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a).

10.

Case law has produced a list of factors which may be relevant for evaluating the adequacy of a disclosure statement, which includes:

> (1) the events which led to the filing of a bankruptcy petition;
> (2) a description of the available assets and their value;
> (3) the anticipated future of the company;
> (4) the source of information stated in the disclosure statement;
> (5) a disclaimer;
> (6) the present condition of the debtor while in Chapter 11;
> (7) the scheduled claims;
> (8) the estimated return to creditors under a Chapter 7 liquidation;
> (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information;
> (10) the future management of the debtor;
> (11) the Chapter 11 plan or a summary thereof;
> (12) the estimated administrative expenses, including attorneys' and accountants' fees;
> (13) the collectability of accounts receivable;
> (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan;

(15) information relevant to the risks posed to creditors under the plan;
(16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers;
(17) litigation likely to arise in a non-bankruptcy context;
(18) tax attributes of the debtor; and
(19) the relationship of the debtor with affiliates.

In re Metrocraft Pub. Serv's, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984); *accord. In re Howell*, No. 09-91538, 2011 WL 1332176, at *1 (Bankr. N.D. Ga. Jan. 21, 2011).

ARGUMENT

11.

The Debtors' Disclosure Statement is deficient, as it does not provide creditors with adequate information to make an informed judgment about the Debtors' Plan. In addition, Debtors' Disclosure Statement, in conjunction with Debtors' Plan, improperly imposes nonconsensual non-debtor releases on creditors who fail to take action to avoid them rather than seek their affirmative consent to such releases, as required by state law. Finally, Debtors' proposed ballot forms fail to adequately explicate the process and effect of the third-party release provisions.

I. Debtors' Disclosure Statement Is Deficient, as It Does Not Provide Creditors with Adequate Information To Make an Informed Judgment Regarding Debtors' Plan.

12.

Debtors' Disclosure Statement gives insufficient information to creditors to make an informed judgment regarding Debtors' Plan as to the following topics:

A. Debtors' Disclosure Statement Fails to Adequately Explain the Rationale for, and Effect, of Substantive Consolidation.

13.

In the Plan and Disclosure Statement, Debtors indicate, for the first time, that Debtors intend to seek substantive consolidation of their twenty cases as part of the confirmation process. (Dkt. 431, Pgs, 27-28; Dkt. No. 432, Pgs, 31-32).

14.

Given Debtors' desire to seek substantive consolidation through the plan confirmation process, the Disclosure Statement should provide creditors a full analysis of the legal issues involved with substantial consolidation, not merely a selected explanation of certain applicable factors.

15.

In addition, Debtors should provide creditors with a full analysis of the ramifications for the Plan if the Court determines substantial consolidation is not appropriate.

16.

Without this detailed information, creditors have inadequate information to make an informed judgement about the plan.

B. Debtors' Disclosure Statement Fails to Provide Adequate Information Regarding the Plan Administration Agreement, the Litigation Trust Agreement, and Schedule of Assigned Causes of Action.

1. Debtors Fail to Provide Adequate Information Regarding the Plan Administration Agreement

17.

Pursuant to Debtors' Disclosure Statement, after conformation of the Plan, the Debtors will be dissolved, and the assets of Debtors will be managed and liquidated by the Plan Administrator. (Dkt. No. 432, Pg. 33)

18.

Pursuant to the Debtors' Disclosure Statement, the Plan Administrator will act pursuant to the Plan Administration Agreement. (Dkt. No. 432, Pg. 33) The Disclosure Statement generally describes the matters to be governed by the Plan Administration Agreement but provides no specific information regarding the contents of the Plan Administration Agreement. Instead, the Plan indicates that a copy of the Plan Administration Agreement shall be filed as part of the Plan Supplement. (Dkt. No. 431, Pg. 17).

19.

Pursuant to Debtors' Plan, the Plan Supplement filing deadline is just seven days prior to the deadline for creditors to cast ballots. (Dkt. No. 431, Pgs. 17). In addition, the Debtors' Plan and Disclosure Statement is not clear as to whether Debtors' creditors will be served with a copy of the Plan Administration Agreement.

20.

As the Plan Administration Agreement governs the powers, duties, and responsibilities of the Plan Administrator, creditors have a critical interest in the specific terms of the Plan Administration Agreement. Creditors should have access to the Plan Administration Agreement prior to approval of the Disclosure Statement. Without this detailed information, creditors have inadequate information to make an informed judgement about the Plan.

2. Debtors Fail to Provide Adequate Information Regarding the Litigation Trust Agreement.

21.

Pursuant to Debtors' Disclosure Statement, distributions to Debtors' general unsecured claims under the Plan will be paid by the Litigation Trust, not Debtors. (Dkt. No. 432, Pgs. 31).

22.

Pursuant to Debtors' Disclosure Statement, the Litigation Trust will be established by the Litigation Trust Agreement. (Dkt. No. 432, Pg. 38). The Disclosure Statement indicates that the Litigation Trust will be administered pursuant to the Plan and Litigation Trust Agreement, but "in the event of any inconsistency solely between Article V.C of the Plan and the Litigation Trust Agreement, the Litigation Trust Agreement shall control, with the Plan controlling in all other cases." (Dkt. No. 432, Pgs, 40-41) The Disclosure Statement generally describes the matters to be governed by the Litigation Trust Agreement but provides no specific information regarding the contents of the Litigation

Trust Agreement. Instead, the Plan indicates that a copy of the Litigation Trust Agreement shall be filed as part of the Plan Supplement. (Dkt. No. 431, Pg. 17). In particular, the Disclosure Statement fails to provide the following information regarding the Litigation Trust and the Litigation Trust Agreement:

(A) Identity of the Litigation Trustee;

(B) Any connections of the Litigation Trustee to Debtors and other parties-in-interest;

(C) The manner in which Litigation Trustee shall choose professionals to assist the Litigation Trustee;

(D) The powers of the Litigation Trust to dispose of estate assets, including the specific claims that will be transferred to the Litigation Trust for pursuit;

(E) Whether the Litigation Trust will have an oversight board to supervise the performance of the Litigation Trustee and the consequences of that decision;

(F) The proposed terms of compensation for the Litigation Trustee and copies of any engagement letters;

(G) Whether the Litigation Trustee will be bonded to ensure the faithful performance of their duties, and if not, the risk to creditors from no bonding requirement;

(H) Whether the Litigation Trustee or professionals hired by the Litigation Trustee will receive liability protections (such as indemnification, exculpation, or releases for future conduct) from the Litigation Trust Agreement;

(I) Whether the Litigation Trustee is required to provide periodic reporting as to the activity of the trust, and if so, details concerning the required contents, the frequency of reports, and the list of who is entitled to receive the reports;

(J) How and at whose instance the Litigation Trustee may be replaced;

(K) The rules governing succession and other changes in any oversight management of the Litigation Trustee;

(L) The provisions for the retention and compensation of professionals to assist the Litigation Trustee with the disposition of the Litigation Trust;

(M) The procedures the Litigation Trustee will follow in resolving disputed claims;

(N) The scope of the Litigation Trustee's authority to settle claims asserted against the estate, as well as to settle causes of action held by the Litigation Trust;

(O) The procedure for effectuating any such settlements;

(P) The procedures for distributions to holders of allowed claims;

(Q) Whether beneficiaries are subject to any restrictions in their ability to transfer their trust interests;

(R) The process for raising issues concerning the Litigation Trustee with the court, including the proposed venue for Litigation Trust disputes and whether the bankruptcy court will retain jurisdiction to hear the disputes;

(S) Any choice of law provisions that will govern Litigation Trust disputes;

(T) How the Litigation Trust will dispose of unclaimed or returned distributions.

23.

Pursuant to Debtors' Plan, the Plan Supplement filing deadline is just seven days prior to the deadline for creditors to cast ballots. (Dkt. No. 431, Pgs. 17). In addition, the Debtors' Plan and Disclosure Statement is not clear as to whether Debtors' creditors will be served with a copy of the Litigation Trust Agreement.

24.

As the Litigation Trust Agreement is the sole mechanism through with distributions are made to general unsecured creditors in the Plan, creditors have a critical interest in the specific terms of the Litigation Trust Agreement. Creditors should have access to the Litigation Trust Agreement prior to approval of the Disclosure Statement. Without this detailed information, creditors have inadequate information to make an informed judgement about the Plan.

3. Debtors Fail to Provide Adequate Information Regarding the Schedule of Assigned Causes of Action

25.

Pursuant to Debtors' Plan, general unsecured creditors will receive proceeds from the Litigation Trust, as the trust liquidates certain causes of action identified in the Schedule of Assigned Causes of Action.

26.

Debtors' Disclosure Statement provides no information regarding the Schedule of Assigned Causes of Action. Debtors' Plan states that Schedule of Assigned Causes of Action will be filed as part of the Plan Supplement. (Dkt. No. 431, Pgs. 8, 17)

27.

Pursuant to Debtors' Plan, the Plan Supplement filing deadline is just seven days prior to the deadline for creditors to cast ballots. (Dkt. No. 431, Pgs. 17). In addition, the Debtors' Plan and Disclosure Statement is not clear as to whether Debtors' creditors will be served with a copy of the Schedule of Assigned Causes of Action.

28.

As the Schedule of Assigned Causes of Action describes the source of any potential recovery for general unsecured creditors, creditors have a critical interest in the Schedule of Assigned Causes of Action. Creditors should have access to the Schedule of Assigned Causes of Action prior to approval of the Disclosure Statement. Without this detailed information, creditors have inadequate information to make an informed judgement about the Plan.

II. Debtors' Disclosure Statement, in Conjunction with Debtors' Plan, Improperly Imposes Third-Party Releases on Creditors Without their Affirmative Consent.

29.

The Debtors' Disclosure Statement should not be approved in its present form, because it explicates and supports a Plan that extracts non-consensual third-party releases from holders of claims or interests that (a) vote to accept the Plan, unless they also check an opt-out box on the ballot, (b) vote to reject the Plan, unless they also check an opt-out box on the ballot, (c) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, (d) are presumed to accept or reject the plan,

unless they opt out of the third-party releases by completing and returning an opt-out election form, despite these parties not being entitled to vote, and (e) have an unclassified claim, but do not object to the third-party releases.

30.

Article VII, Section I, Part 4 of Debtors' Disclosure Statement provides for Third-Party Releases (the "Third Party Releases"):

> Notwithstanding anything contained in the Plan to the contrary, as of the Effective Date, and to the fullest extent allowed by applicable law, each Releasing Party is deemed to have forever released, waived, and discharged each of the Released Parties from all Claims and Causes of Action, whether known or unknown, including any derivative claims asserted or assertable on behalf of the Debtors or their respective Estates, that such Entity would have been legally entitled to assert (whether individually or collectively) based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), any securities issued by the Debtors and the ownership thereof, the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions (but excluding Avoidance Actions brought as counterclaims or defenses to Claims asserted against the Debtors), any intercompany transaction, the DIP Loan Documents, Prepetition Loan Documents, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, solicitation of votes on the Plan, the prepetition negotiation and settlement of Claims, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the issuance or distribution of debt and/or securities pursuant to the Plan, or the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, except for Claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, knowing violation of law or gross negligence, but in all respects such Released Parties shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan (the "Third-Party Release"); provided, however, the Third-Party Release does not release any post-Effective Date obligations of any party or Entity under the Plan, or any document, instrument, or agreement (including

> the Plan Documents and other documents, instruments, and agreements set forth in the Plan Supplement) executed to implement the Plan.
>
> Notwithstanding anything to the contrary in the foregoing, any Holder of a Claim or Interest who did not (i) return a Ballot or opt-out election form or (ii) file an objection to the Third-Party Release, that believes that its individual circumstances related to its ability to return a Ballot or opt-out election form opting out of the Third-Party Release or to object to the Third-Party Release are such that it should not be deemed to have consented to such Third-Party Release as a result of such failure, may seek relief from the Bankruptcy Court to exercise its rights and claims free of the Third-Party Release by rebutting the presumption that its failure to return a Ballot or opt-out election form opting out of the Third-Party Release or to object to the Third-Party Release should be deemed to represent its consent to the Third-Party Release. Any party seeking such relief must, in any pleading regarding this provision filed with the Bankruptcy Court: (i) identify the claim(s) or types of claims the party wishes to pursue and (ii) identify the parties or the types of parties against such claims will be asserted.
>
> Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval, pursuant to Bankruptcy Rule 9019, of the Third-Party Release, which includes by reference each of the related provisions and definitions contained in this Plan, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Release is: (a) consensual; (b) essential to the confirmation of the Plan; (c) given in exchange for the good and valuable consideration provided by the Released Parties, including the Released Parties' contributions to facilitating the Plan Transaction and implementing the Plan; (d) a good faith settlement and compromise of the Claims released by the Third-Party Release; (e) in the best interests of the Debtors and their Estates; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Releasing Parties asserting any claim or Cause of Action of any kind whatsoever released pursuant to the Third-Party Release.

(Dkt. No. 432, Pgs, 53-54).

31.

The Disclosure Statement does not define the phrases "Releasing Parties" or "Released Parties". However, Article I, Sec. A, Pt. 140. of the Plan provides the definition of "Releasing Party" as follows:

> "*Releasing Party*" means each of the following, solely in its capacity as such: (a) the Debtors; (b) the Estate; (c) the DIP Agent; (d) the DIP Lenders; (e) the Prepetition Agent; (f) the Prepetition Lenders; (g) the CPO; (h) with respect to each of the foregoing entities in clauses (a) through (g), such entity's respective current and former Affiliates, and each of such entity's, and such entity's current and former Affiliates', current and former equity holders (regardless of whether such interests are held directly or indirectly), subsidiaries, officers, directors, managers, principals, members, employees, agents, advisors, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such; (i) all Holders of Claims and Interests that vote to accept the Plan; (j) all Holders of Claims and Interests that are deemed to accept the Plan and do not opt out of the Third-Party Release; (k) all Holders of Claims and Interests in voting classes that abstain from voting on the Plan and do not opt out of the Third-Party Release; (l) all Holders of Claims and Interests that vote, or are deemed, to reject the Plan and do not opt out of the ThirdParty Release; (m) each Holder of an unclassified Claim who does not object to the Third-Party Release; and (n) all other Holders of Claims and Interests to the maximum extent permitted by law.

Plan, Art. I, Sec. A, Pt. 140. (Dkt. No. 431, Pg. 19).

32.

Article I, Sec. A, Pt. 139. of the Plan provides a definition of "Released Parties" as follows:

> "*Released Party*" means each of the following, solely in its capacity as such: (a) the DIP Agent; (b) the DIP Lenders; (c) the Prepetition Agent; (d) the Prepetition Lenders; (e) the CPO; (f) the Released Debtor D&Os; and (g) the Debtors' Professionals retained in these Chapter 11 Cases; (i) with respect to the Entities in the foregoing clauses (a) through (g), each such Entity's current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, control persons, equity holders (regardless of whether such interests are held directly or indirectly), affiliated investment funds or investment vehicles, participants, managed accounts or funds, fund advisors, predecessors, successors, assigns, subsidiaries, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, investment managers, and other professionals, each in their capacity as such; provided that any Holder of a

> Claim that opts out of the Third-Party Releases contained in the Plan and any Holder of a Claim or Interest that is not a Releasing Party shall not be a "Released Party". For the avoidance of doubt, the Non-Released Debtor D&Os shall not be Released Parties.

Plan, Art. I, Sec. A, Pt. 139. (Dkt. No. 431, Pg. 19).

33.

In *Harrington v. Purdue Pharma L.P.*, 603 U.S. 204, 144 S. Ct. 2071 (2024), the Supreme Court held that non-consensual third-party releases are not authorized under the United States Bankruptcy Code. As a result, nonconsensual third-party releases cannot be included in a proposed plan.

34.

Whether parties have reached an agreement—including an agreement not to sue—is governed by state law. *See In re Smallhold, Inc.* 2024 WL 4296938, at *11 (Bankr. D. Del. Sept. 25, 2024). [2] The only exception is if there is federal law that preempts applicable state contract law. *See, e.g., Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 416 (2010) (plurality) ("For where neither the Constitution, a treaty, nor a statute provides the rule of decision or authorizes a federal court to supply one, 'state law must govern because there can be no other law.'") (quoting *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965)).

[2] The United States Trustee acknowledges *In re LaVie Care Centers, LLC, et. al.* , 2024 Bankr. LEXIS 2900, 2024 WL 4988600 (N.D.GA. Bank. 2024)(Baisier, J.), in which this Court found that an "opt out" third-party release was consensual under certain specific facts and circumstances. The United States Trustee contends that the facts and circumstances in the present case differ from those present in *LaVie*. In her objection to confirmation of Debtors' Plan, the United States Trustee will more fully address the Court's ruling in *LaVie,* and the factual distinctions in this case which makes the third-party release impermissible.

35.

No federal law applies to the question of whether the nondebtor Releasing Parties have agreed to release the non-debtor Released Parties. The Bankruptcy Code does not apply to agreements between non-debtors. And no Code provision authorizes courts, as part of an order confirming a chapter 11 plan, to "deem" a non-debtor to have consented to an agreement to release claims against other non-debtors where consent would not exist under state law. Nor does 11 U.S.C. § 105(a) confer any power to override state law. Rather, section 105(a) "serves only to carry out authorities expressly conferred elsewhere in the code." *Purdue Pharma, L.P.*, 144 S. Ct. at 2082 n.2 (quotation marks omitted). Bankruptcy courts cannot "create substantive rights that are otherwise unavailable under applicable law," nor do they possess a "roving commission to do equity." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (quotation omitted). Thus, the state-law definition of consent is not diluted or transformed by the Code.

36.

Indeed, even as to a debtor, it is well settled that whether parties have entered a valid settlement agreement is governed by state law. *See Houston v. Holder (In re Omni Video, Inc.)*, 60 F.3d 230, 232 (5th Cir. 1995) ("Federal bankruptcy law fails to address the validity of settlements and this gap should be filled by state law."); *De La Fuente v. Wells Fargo Bank, N.A. (In re De La Fuente)*, 409 B.R. 842, 845 (Bankr. S.D. Tex. 2009) ("Where the United States is not a party, it is well established that settlement agreements in pending bankruptcy cases are considered contract matters governed by state law."). *See also Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 450-

451 (2007) ("[T]he basic federal rule in bankruptcy is that state law governs the substance of claims, Congress having generally left the determination of property rights in the assets of a bankrupt's estate to state law.") (quotation marks omitted); *Butner v. United States*, 440 U.S. 48 (1979) ("Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law.").

37.

Because "[c]ourts generally apply contract principles in deciding whether a creditor [or equity holder] consents to a third-party release, [when-] consent is in question, applicable state contract law provides the most appropriate standard to determine consent . . ." *In re Stein Mart, Inc.*, 629 B.R. 516, 523 (Bankr. M.D. Fla. 2021) (bracketing added); *see also In re Smallhold, Inc.*, 2024 WL 4296938, at *11 (requiring "some sort of affirmative expression of consent that would be sufficient as a matter of contract law"); *In re SunEdison, Inc.,* 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) ("Courts generally apply contract principles in deciding whether a creditor consents to a third-party release."); *In re Arrowmill Dev. Corp*., 211 B.R. 497, 506 (Bankr. D.N.J. 1997) (holding that a third-party release "is no different from any other settlement or contract"); *id*. at 507 (holding that "the validity of the release … hinge[s] upon principles of straight contract law or quasi-contract law rather than upon the bankruptcy court's confirmation order") (internal quotation marks omitted) (alterations in original). As one court recently held, because "nothing in the bankruptcy code contemplates (much less authorizes it) … any proposal for a non-debtor release is an ancillary offer that becomes a contract upon acceptance and consent." *In re Tonawanda Coke Corp*., 2024 WL 4024385, at *2 (Bankr. W.D.N.Y. Aug. 27, 2024)

(quoting *Purdue*, 144 S. Ct. at 2086). Accordingly, "any such consensual agreement would be governed by state law." *Id.*

38.

Here, the Debtors cannot meet the state-law burden of establishing that the Releasing Parties expressly consent to release their property rights or to having that release memorialized in the Disclosure Statement and Plan.

39.

The "general rule of contracts is that silence cannot manifest consent." *Patterson v. Mahwah Bergen Ret. Grp., Inc.,* 636 B.R. 641, 686 (E.D. Va. 2022).

40.

As explained in the Restatement (Second) of Contracts: "Acceptance by silence is exceptional. Ordinarily an offeror does not have power to cause the silence of the offeree to operate as acceptance." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981).

41.

"[T]he exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of *intention* that silence may operate as acceptance. Even in those cases the contract may be unenforceable under the Statute of Frauds." RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981)

42.

Accordingly, "[t]he mere receipt of an unsolicited offer does not impair the offeree's freedom of action or inaction or impose on him any duty to speak." RESTATEMENT

(SECOND) OF CONTRACTS § 69 cmt. a (1981). *See also Patterson*, 636 B.R. at 686 (discussing how contract law does not support consent by failure to opt out). Further, "[t]he mere fact that an offeror states that silence will constitute acceptance does not deprive the offeree of his privilege to remain silent without accepting." RESTATEMENT (SECOND) OF CONTRACTS § 69, cmt. c (1981). *See also Reichert v. Rapid Invs., Inc.*, 56 F.4th 1220, 1227-28 (9th Cir. 2022) ("[E]ven though the offer states that silence will be taken as consent, silence on the part of the offeree cannot turn the offer into an agreement, as the offerer cannot prescribe conditions so as to turn silence into acceptance." (quotation marks omitted); *Imperial Ind. Supply Co v. Thomas*, 825 F. App'x 204, 207 (5th Cir. Sept. 2, 2020) ("Tacit acquiescence between relative strangers ignores the basic tenets of contract law. . . . While there may be exceptions in cases involving parties with longstanding relationships, generally speaking, 'silence or inaction does not constitute acceptance of an offer.'") (quoting *Norcia v. Samsung Telecomms Am., LLC*, 845 F.3d 1279, 1284 (9th Cir. 2017)).

43.

Georgia common law, as a point of reference, is in accord. "Mutual assent, or a meeting of the minds, 'is the first requirement of the law relative to contracts.' " *Purvis v. Aveanna Healthcare, LLC*, 563 F. Supp. 3d 1360, 1379 (N.D. Ga. 2021) (citations omitted). Georgia law is clear: "silence, standing alone, does not demonstrate the 'mutual assent or meeting of the minds' required to create an enforceable contract . . . . [u]nder Georgia's objective theory of intent . . . ." *In re Equifax, Inc., Customer Data Sec. Breach Litig.*, No.

1:17-MD-2800, 2022 WL 1122841, at *6 (N.D. Ga. Apr. 13, 2022) (*quoting Hart v. Hart*, 297 Ga. 709, 711–12 (2015)).

44.

Applicable state contract law cannot be disregarded on a default theory, applied by some courts, that creditors who remain silent forfeit their rights against non-debtors because they received notice of the non-debtor release, just as they would forfeit their right to object to a plan if they failed timely to do so. *See, e.g., In re Arsenal Intermediate Holdings, LLC*, 2023 WL 2655592 (Bankr. D. Del. Mar. 27, 2023), *abrogated by In re Smallhold, Inc.*, 2024 WL 4296938, at *8-*11. As explained in the *Smallhold* opinion, the Supreme Court's *Purdue Pharma* decision undermined the fundamental premise of default theory — that a bankruptcy proceeding legally could lead to the destruction of creditors' rights against non-debtors, so they had best pay attention lest they risk losing those rights. *In re Smallhold, Inc.*, 2024 WL 4296938, at *1-*2; *see also id*. at *10 ("The possibility that a plan might be confirmed that provided a nonconsensual release was sufficient to impose on the creditor the duty to speak up if it objected to what the debtor was proposing."). Under the default theory, because pre-*Purdue Pharma* a chapter 11 plan could permissibly include nonconsensual, non-debtor releases, non-debtor releases were no different from any other plan provision to which creditors had to object or risk forfeiture of their rights. *See id*. at *10. A failure to opt out under the default theory is not truly consent, but rather "an administrative shortcut to relieve those creditors of the burden of having to file a formal plan objection." *See id*. at *2; *see also id*. at *9 ("In this context, the word 'consent' is used

in a shorthand, and somewhat imprecise, way. It may be more accurate to say that the counterparty forfeits its objection on account of its default.").

45.

But entering relief against a party who defaulted by not responding is, "[u]nder established principles" permissible "only after satisfying themselves that the relief the plaintiff seeks is relief that is at least potentially available to the plaintiff in litigation." *Id*. at *2; *see also id*. at *13 ("[T]he obligation of a party served with pleadings to appear and protect its rights is limited to those circumstances in which it would be appropriate for a court to enter a default judgment if a litigant failed to do so. [After *Purdue Pharma*], that is no longer the case in the context of a third-party release."). After *Purdue Pharma*, however, it is now clear that imposition of a non-debtor release is not available relief through a debtor's chapter 11 plan. *See id*. at *2 ("After *Purdue Pharma*, a third-party release is no longer an ordinary plan provision that can properly be entered by 'default' in the absence of an objection."); *see also id*. at *10.

46.

The *Smallhold* court provided an illustration that makes obvious why notice-plus-failure-to-opt-out is not consent:

> Consider, for example, a plan of reorganization that provided that each creditor who failed to check an "opt out" box on a ballot was required to make a $100 contribution to the college education fund for the children of the CEO of the debtor. Just as in the case of Party A's letter to Party B, no court would find that in these circumstances, a creditor that never returned a ballot could properly be subject to a legally enforceable obligation to make the $100 contribution.

Id. at *2 (footnote omitted). Cases that impose a non-debtor release based merely on the failure to opt out fail to provide a limiting principle to distinguish the third-party release from the hypothetical college education fund plan; after *Purdue Pharma*, there is none. *Id*. Thus, "ordinary contract principles" must apply to determine whether there is consent to a non-debtor release. *Id*. at *3.

47.

Under ordinary contract principles, an affirmative agreement — something more than the failure to opt out— is required to support a consensual third-party release. *See In re Smallhold, Inc.*, 2024 WL 4296938, at *3 ("[A] creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent.");[3] *see also id*. at *8; *In re Tonawanda Coke Corp.,* 2024 WL 4024385, at *2; *Patterson*, 636 B.R. at 686. Failing to "opt out" of an offer is not a manifestation of consent unless one of the exceptions to the rule that silence is not consent applies, such as conduct by the offeree that manifests an intention that silence means acceptance or taking the offered benefits. For example, the *Patterson* court, in applying black-letter contract principles to opt-out releases in a chapter 11 plan, found that contract law does not support consent by failure to opt-out. *Patterson*, 636 B.R. at 686. "Whether the Court labels these 'nonconsensual' or based on

[3] The court in *Smallhold* found that, in at least some circumstances, a failure to opt out constitutes consent when a claimant votes—either to accept or reject a plan—but not if they do not vote. *See Smallhold,* 665 B.R. at 723. The latter conclusion is correct, but the *Smallhold* court incorrectly reasoned that because the act of voting on a debtor's plan is an "affirmative step" taken after notice of the third-party release, failing to opt out binds the voter to the release. *Id*. But while voting is an "affirmative step" with respect to the debtor's plan, it is not a "*manifestation of intention* that silence may operate as acceptance" of a third-party release. RESTATEMENT (SECOND) OF CONTRACTS § 69 cmt. a (1981) (emphasis added). And notably, the court did not allow the act of voting in favor itself, without more, to constitute consent.

'implied consent' matters not, because in either case there is a lack of sufficient affirmation of consent." *Id.* at 688.

48.

Similarly, a vote in favor of a Plan cannot constitute consent to a third-party release. Debtors mistakenly equate a vote for the Plan, which is governed by the Bankruptcy Code's provisions for adjusting relations between a debtor and its creditors, with acceptance of proposed third-party releases, which are contracts governed by state law dealing with relations between non-debtor parties. Those are distinct legal constructs involving distinct parties: the Plan disposes of a creditor's claims against the debtor, while a third-party release disposes of a non-debtor's right to sue other non-debtors. There is nothing in the Code that authorizes treating a vote to accept a chapter 11 plan as consent to a third-party release. "[A] creditor should not expect that [its] rights [against non-debtors] are even subject to being given away through the debtor's bankruptcy." *Smallhold,* 665 B.R. at 721.

49.

In this case, the Disclosure Statement supports a Plan that improperly extracts non-consensual third-party releases from holders of claims or interests that (1) vote to accept the Plan; (2) vote to reject the Plan, unless they also check an opt-out box on the ballot; (3) are entitled to vote and do not cast a ballot, including those who may not have received the solicitation materials, unless they also check an opt-out box on the ballot; (4) are presumed to accept or reject the plan, unless they opt out of the third-party releases by completing and returning an opt-out election form, despite these parties not being entitled to vote; or (5) have an unclassified claim, but do not object to the third-party releases.

50.

Accordingly, the Disclosure Statement must be stricken or amended to ensure consent from creditors, because silence from creditors is not affirmative consent.

51.

Moreover, Article VII, Section I, Part 4 provides that the Third-Party Release will be "a bar to any of the Releasing Parties asserting any claim or Cause of Action of any kind whatsoever released pursuant to the Third-Party Release." This appears to be asking the Court to issue an injunction to enforce the Third-Party Release. But *Purdue* clearly stands for the proposition that non-consensual third-party releases and injunctions are not permitted by the Bankruptcy Code. *See Purdue Pharma*, 144 S.Ct. at 2088. As the *Purdue* court noted, the Bankruptcy Code allows courts to issue an injunction in support of a non-consensual, third-party release in exactly one context: asbestos-related bankruptcies, and these cases are not asbestos-related. *See Purdue Pharma*, 144 S. Ct. at 2085 (citing 11 U.S.C. § 524(e)). Even if non-debtor releases are consensual, there is no Code provision that authorizes chapter 11 plans or confirmation orders to include injunctions to enforce them. Further, such an injunction is not warranted by the traditional factors that support injunctive relief because, if the release is truly consensual, there is no threatened litigation and no need for an injunction to prevent "immediate and irreparable harm" to either the estates or the released parties. A consensual release may serve as an affirmative defense in any ensuing, post-effective date litigation between the third party releasees and releasors, but there is no reason for this Court to be involved with the post-effective date enforcement of those releases. Moreover, this injunction essentially precludes any party deemed to

consent to this release from raising any issue with respect to the effectiveness or enforceability of the release (such as mistake or lack of capacity) under applicable non-bankruptcy law.

III. Debtors' Proposed Ballot Forms Fail to Concisely Explain the Effect of the Third-Party Releases, and the Effect of the "Opt-Out" Option.

52.

The Solicitation Procedures Motion includes proposed forms for ballots for specific classes of creditors under the Plan. (Dkt. No. 433, Ex. 1-A, 1-B, 2-A, and 2-B)

53.

The proposed ballots quote lengthy provisions from the Plan regarding both Debtors Releases and Third-Party Releases. However, these provisions are both dense and difficult for a creditor, untrained in bankruptcy law, to understand.

54.

In addition, the proposed ballots place the denotation for an "opt-out" of the potential third-party release deep in the middle of each ballot, isolated from all other portions of the ballot a respective creditor may complete.[4]

55.

The proposed ballots should be both convenient to navigate, and decipherable by the creditor body. Accordingly, the proposed ballots should be amended, to (1) include plain language regarding the effects and ramifications of the third-party releases in the

[4] By raising the issue of clarity regarding the Debtors' proposed form of ballots, the United States Trustee does not waive her prior arguments against the inclusion of the Third-Party Releases in the Disclosure Statement.

Plan; and (2) position any applicable denotation for the third-party releases at the beginning of the ballot, along with the other portions of the ballot a creditor may complete.

WHEREFORE, the United States Trustee respectfully requests that the Court sustain the United States Trustee's Objection, deny approval of the Debtors' Disclosure Statement and Solicitation Procedures Motion until Debtors address the issues in the Objection, and grant such further relief as the Court deems fair and equitable.

Respectfully submitted this 13th day of June, 2025.

MARY IDA TOWNSON
UNITED STATES TRUSTEE
REGION 21

s/ Jonathan S. Adams
Jonathan S. Adams
Trial Attorney
Georgia Bar No. 979073

United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Spring Street, SW
Atlanta, Georgia, 30303
404-331-4438
Jonathan.S.Adams@usdoj.gov

CERTIFICATE OF SERVICE

This is to certify that I have on this day electronically filed the foregoing *United States Trustee's Objection to Debtors' Disclosure Statement and Form of Ballots* using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of this document and an accompanying link to this document to the following party who has appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

- **Evan M. Altman** evan.altman@laslawgroup.com, soraya.hedjazi@laslawgroup.com
- **Danielle Barav-Johnson** dahnibarav-johnson@eversheds-sutherland.com
- **Colin Michael Bernardino** **c**bernardino@kilpatricktownsend.com, moroberts@ktslaw.com
- **Jason B. Binford** jbinford@krcl.com
- **Kit Barron Bradshaw** k.bradshaw@earlandearl.com, kbradshaw@barronfirm.com; collin@earlandearl.com
- **Heather D. Brown** heather@hdbrownlaw.com
- **Jeremy Patrick Burnette** jeremy.burnette@akerman.com
- **Christopher K. Coleman** christopher.coleman@kslaw.com
- **Jeff Dutson** **j**dutson@kslaw.com
- **Ian M. Falcone** legalassistant@falconefirm.com
- **Ebba Gebisa** ebba.gebisa@lw.com, christopher.tarrant@lw.com;ebba-gebisa-1560@ecf.pacerpro.com
- **Andrew Glenn** aglenn@glennagre.com
- **Glenn E. Glover** gglover@bradley.com, kpbarnes@bradley.com
- **Tara L. Grundemeier** Tara.Grundemeier@lgbs.com, Monica.Herrera@lgbs.com; Houston_bankruptcy@lgbs.com
- **Esther Hong** ehong@glennagre.com
- **Anna Mari Humnicky** ahumnicky@smallherrin.com, klemons@smallherrin.com; kweindorf@smallherrin.com
- **Nathan G. Kanute** **n**kanute@swlaw.com, jfung@swlaw.com; sdugan@swlaw.com; mfull@swlaw.com; docket_las@swlaw.com; ljtaylor@swlaw.com
- **Robert R. Kinas** rkinas@swlaw.com, jfung@swlaw.com; sdugan@swlaw.com; mfull@swlaw.com; docket_las@swlaw.com
- **Benjamin S. Klehr** bklehr@smallherrin.com, klemons@smallherrin.com; kweindorf@smallherrin.com
- **David B. Kurzweil** kurzweild@gtlaw.com, brattons@gtlaw.com
- **Matthew W. Levin** mlevin@swlawfirm.com, fharris@swlawfirm.com; centralstation@swlawfirm.com; rwilliamson@swlawfirm.com; aray@swlawfirm.com; hkepner@swlawfirm.com
- **Cia H. Mackle** cmackle@pszjlaw.com
- **Gary W. Marsh** gary.marsh@troutman.com, wlbank@troutman.com

- **Kurt Mayr** kmayr@glennagre.com
- **Cameron M. McCord** cmccord@joneswalden.com, jwdistribution@joneswalden.com; ljones@joneswalden.com; cparker@joneswalden.com; lpineyro@joneswalden.com; bdernus@joneswalden.com
- **Mark A. Mintz** mmintz@joneswalker.com, hstewart@joneswalker.com
- **Matthew Petrie** petriem@gtlaw.com
- **Richard Ramirez** rramirez@glennagre.com
- **Pierce Rigney** pierce.rigney@troutman.com, WLBANK@troutman.com
- **Luis Salazar** luis@salazar.law, lee-sin@salazar.law
- **Henry F. Sewell** hsewell@sewellfirm.com, hsewell123@yahoo.com
- **Gus H. Small** gsmall@smallherrin.com, klemons@smallherrin.com
- **John A. Thomson** john.thomson@arlaw.com, lianna.sarasola@arlaw.com
- **John Kendrick Turner** john.turner@lgbs.com
- **David Wender** davidwender@eversheds-sutherland.com
- **Elizabeth Wiehle** ewiehle@pbfcm.com
- **J. Robert Williamson** rwilliamson@swlawfirm.com, centralstation@swlawfirm.com; aray@swlawfirm.com; hkepner@swlawfirm.com; fharris@swlawfirm.com; mlevin@swlawfirm.com

I further certify that on this day, I caused a copy of this document to be served via United States First Class Mail, with adequate postage prepaid on the following parties at the address shown for each.

AFH Air Pros, LLC
150 S. Pine Island Road, Suite 200
Plantation, Florida 33324

Dated: June 13, 2025.

s/ Jonathan S. Adams
Jonathan S. Adams
Trial Attorney
United States Department of Justice
Office of the United States Trustee
362 Richard Russell Building
75 Ted Turner Drive, SW
Atlanta, Georgia 30303
404-331-4438
Jonathan.S.Adams@usdoj.gov